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In The

Supreme Court of the United States

October Term, 1974

No. 74-476

WILLIE PENN and CHARLES F. FOSTER, JR., individually and on behalf of all persons similarly situated, and

ALABAMA STATE CONFERENCE OF NAACP, INC., a non-profit Alabama corporation, individually and on behalf of its black members and on behalf of the class similarly situated,

Petitioners,

-v.-

JAMES R. SCHLESINGER, individually and as SECRETARY OF DEFENSE, etc., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners Willie Penn, Charles F. Foster, Jr., and the Alabama State Conference of NAACP, Inc., on behalf of its members, respectfully pray that a writ of certiorari issue to review

the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 26, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, sitting *en banc*, is appended to this petition at 1a. The judgment and panel opinions of the Court of Appeals, the dissenting opinion of which was adopted in its entirety by the court sitting *en banc*, is reported at 490 F.2d 700 (5th Cir. 1974) and is appended at 13a. The order of the United States District Court for the Middle District of Alabama, which is reported at 350 F.Supp. 752 is appended at 46a.

JURISDICTION

The judgment of the Court of Appeals, sitting *en banc*, was entered on July 26, 1974. The petition for writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. In a suit brought by current and prospective employees of the federal government charging racial discrimination in employment contrary to 42 U.S.C. §1981 and the fifth amendment to the Constitution, must administrative remedies set up by executive order but unprescribed by §1981 be exhausted before the suit may be filed?

II. In a suit brought by current and prospective employees of the federal government, were administrative remedies adequately exhausted where administrative officers refused to permit the filing of a written complaint, such written complaint being required by administrative regulations in order to pursue further administrative remedies?

III. In a suit brought by current and prospective employees of the federal government, were administrative remedies adequately exhausted where the administrative regulations provided no complaint procedure whatsoever for prospective

employees discriminated against or for the organization representing them?

IV. In a suit brought by current and prospective employees of the federal government, were administrative remedies adequately exhausted where as to one plaintiff, the administrative officer charged with the duty of informing the aggrieved employee of his right to file a complaint, failed to perform this duty?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Involved in this case are the fifth amendment to the United States Constitution, 42 U.S.C. Section 1981 and 5 C.F.R. 713, *et seq.* The provisions of 5 C.F.R. 713, *et seq.* are set out in pertinent part at Appendix, p. 101a.

STATEMENT OF THE CASE

Willie Penn and Charles F. Foster, Jr., are civilian employees of the Department of

Defense at Maxwell Air Force Base, in Montgomery, Alabama. The Alabama Conference of the NAACP is a black membership organization which has sued in the past to protect the right of its members to equal access to public employment opportunities.[1/] Mr. Penn and Mr. Foster brought this action after thay had been repeatedly denied promotions;[2/] the NAACP joined in the suit,

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1/ *See* NAACP v. Allen, 493 F.2d 970 (5th Cir. 1974).

2/ Over a period of seventeen years, dating from 1955, Mr. Penn was consistently denied meaningful job advancement, most recently just eight months before the instant complaint was filed. At that time two white persons with less experience and seniority were chosen over him for a position as procurement analyst. (App. p. 84a.)

Mr. Foster, who served in the Navy for four years as a boiler expert, applied for promotion to a position in the Maxwell A.F.B. steam plant, theretofore an all-white facility widely known as having jobs for whites only. (App. p. 98a.) Mr. Foster was subsequently placed in a clerk position, the salary for which was downgraded for him alone, whites in the category receiving a higher salary. Finally, Mr. Foster, with two years of business school study recently finished, was rejected for two higher procurement positions, his white supervisor choosing instead two white women who had only high school diplomas

recognizing that the federal government – which had just successfully sued the state for racial discrimination in employment[3] – had an even worse record of racist hiring than the state itself. The plaintiffs named as defendants the officials heading the seventeen federal agencies and departments which showed the most egregious statistical record for hiring blacks.[4]

The defendants twice moved to dismiss the complaint, submitting briefs which argued that the federal officials were protected from suit by sovereign immunity and that the plaintiffs had failed to exhaust their administrative remedies. In response to the first of these motions the plaintiffs added to their complaint

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and were less qualified than he. Indeed, one had so little experience that she was appointed in an "acting" capacity until experience was obtained. (App. p. 100a.)

3/ United States v. Frazer, 317 F.Supp. 1079 (M.D. Ala. 1970).

4/ App. p. 75a.

paragraphs showing their attempts to resolve their grievances within the administrative complaint process.[5] Mr. Penn alleged that he had made known to his Equal Employment Opportunity (E.E.O.) Counselor his frustration at non-advancement, but she failed in her prescribed duty to advise Penn of his right to consult an E.E.O. officer who could accept his complaint. (App. p. 96a.) Mr. Foster alleged that he had approached his E.E.O. counselor, who dutifully referred him to an E.E.O. officer, but the E.E.O. officer refused to permit Foster to file a written administrative grievance.[6] (App. p. 101a.) Since no procedures existed for an administrative complaint by the NAACP, it had taken

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5/ The amended complaint also presented an opportunity for Mr. Foster to join Mr. Penn as co-plaintiff. (App. p. 95a.)

6/ The regulations establishing the complaint procedure required the filing of a written complaint as a prerequisite for taking an appeal to the Civil Service Commission. 5 C.F.R. §713.214 (1971).

no administrative action that could be set out in the amended complaint. The district court, Johnson, C. J., denied the motions to dismiss (App. p. 61a), but found the issues sufficiently troublesome in light of contrary precedent[7/] that it certified

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7/ *See* Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972), Blaze v. Moon, 440 F.2d 1348 (1971), Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969) (per Judge, now Justice, Blackmun), cert. denied, 397 U.S. 934 (1970). The plaintiffs presented apparently convincing arguments to show that *Beale* and *Blaze* ignored overriding Supreme Court precedents which established that the sovereign immunity defense is unavailable to defendant federal officials who either act unconstitutionally or ultra vires their authority. *See*, Dugan v. Rank, 372 U.S. 609 (1963); Larson v. Domestic & For. Commerce Corp., 337 U.S. 682 (1949). The Eighth Circuit's decision in *Gnotta v. United States, supra,* noted that the plaintiff's attack on his supervisor's national-origin discrimination "obviously" did not fall within the *Larson-Dugan* exceptions to sovereign immunity. 415 F.2d 127 . The plaintiffs in the case *sub judice* were able to show (1) that racial discrimination was unconstitutional and thus fell within the *Larson-Dugan* exceptions, *see*, Bolling v. Sharpe, 347 U.S. 497 (1954), and (2) that the plaintiff in *Gnotta* had apparently failed to make the key allegation that the claimed discrimination was unconstitutional or exceeded the defendant's authority, *see* Brief for Appellant in Gnotta v. United States, 397 U.S. 934 (1970), denying cert. to 415 F.2d 1271 (8th Cir. 1969).

them for interlocutory appeal pursuant to 28 U.S.C. §1292(b). (App. p. 46a.) By order entered November 21, 1972, the Court of Appeals granted the defendant federal officials leave to appeal the district court's order.

A panel of the Court of Appeals affirmed Judge Johnson's ruling, one judge dissenting. The federal officials asked and were granted rehearing *en banc*, the full court reversing the panel and adopting the opinion of the panel dissenter as its own. (App. p. 1a.) That opinion held that the plaintiffs had not sufficiently exhausted their administrative remedies, reasoning that the administrative officers' refusal to advise plaintiff Penn of his right to file a grievance and refusal to allow plaintiff Foster to file a written grievance were mere "procedural slipups" which should have been subjected to administrative "self correction." (App. p. 41a.) Judge Tuttle, joined by three

others, dissented, arguing that exhaustion was not required in suits brought under 42 U.S.C. §1981 and that, in any event, remedies had been exhausted in the instant case.[8/]

REASONS FOR GRANTING THE WRIT

I.

THE ISSUES PRESENTED CONCERN THE EFFECTIVE OPERATION OF OUR NATIONAL GOVERNMENT'S ADMINISTRATIVE SYSTEM FOR ERADICATING FEDERAL EMPLOYMENT DISCRIMINATION.

The federal government has a substantial and unequivocal commitment to outlawing discriminatory employment practices in its public service occupations. The prohibition against discrimination is set forth in a long string of executive

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8/ By dismissing the complaint for failure to exhaust remedies, the *en banc* court skirted the major issue raised in the district court, the availability of sovereign immunity as a defense for discriminating federal officials.

orders[9/] and federal statutes[10/] and even in the Constitution itself.[11/] But our decisive legal commitments to ending discrimination is a mockery unless the administrative system which enforces our commitment does its job.

And our present system has indeed failed in its job. Two massive studies undertaken in 1972 came to that conclusion,[12/] as did the Congress. In passing the first modern statutory scheme for remedying federal employment discrimination, Congress pointedly alluded to the

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9/ *E.g.*, Exec. Order No. 11478, 34 Fed. Reg. 12985, as amended by Exec. Order No. 11590, 36 Fed. Reg. 7831.

10/ Civil Rights Act of 1866, 42 U.S.C. §1981; 42 U.S.C. §2000e-16; 5 U.S.C. §7151.

11/ U. S. Constitution, Amendment V; *cf.* Frontiero v. Richardson, 411 U.S. 677 (1973).

12/ Public Interest Research Group; BEHIND THE PROMISE: EQUAL EMPLOYMENT IN THE FEDERAL GOVERNMENT (1972); R. Rittenoure, Black Employment in the South: The Case of the Federal Government (contract study no. 81-46-70-24, Manpower Administration, U. S. Dept. of Labor, 1972) [published by the Center for the Study of Human Resources, University of Texas, Austin, Texas].

failures of the administrative system for handling complaints:

> Th[e] disproportionate distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity.
>
> A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment.13/

While Congress, privately funded reformers, and government-contract researchers have recommended or enacted strong measures for rejuvenating the anti-discrimination complaint procedures, the Fifth Circuit has frustrated that goal by refusing to police the administrative process. Indeed, by sanctioning the wrong-doing of administrative officers and counselors in the case *sub judice*,14/ the Court of Appeals has

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13/ H.R. Rep. No. 92-238, on H.R. 1746, 92d Cong., 1st Sess., 23-24 (1971).

14/ *See* p. 9 *supra*.

undermined the effectiveness of the entire complaint process. While professing respect for the administrative system, the decision below reinforces those elements which have brought the system disrespect. Only if administrative officers are made to fulfill their duties in processing grievances can the administrative process work.

Although the plaintiff-petitioners' claims arose before the effective date of the 1972 Equal Employment Act, and are prosecuted under the older 1866 Civil Rights Act,15/ the administrative procedures which petitioners attempted to exhaust are substantially identical to those in force today.16/ By reviewing and reversing the judgment below, the Court will promote the

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15/ 42 U.S.C. §1981 is derived from the 1866 Act, as was 42 U.S.C. §1982. *See* Tillman v. Wheaton-Haven, 410 U.S. 431, 439, n. 11 (1973); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970).

16/ *See* App. at 38a. n. 2, 40a n. 3.

effectiveness of the anti-discrimination complaint process, and thereby increase respect for the process and satisfaction with its results. By agreeing that petitioners' need not return again to the administrative procedure, the Court will force the government's equal opportunity administrators to exercise their duties responsibly in the future, at the risk of losing their administrative power.17/ As Judge Tuttle said in his panel opinion, App. at 27a,

> our interpretation of the exhaustion requirement here should help insure that, in the future, federal agencies process such complaints in accordance with their own procedures rather than short-circuiting them into federal court.

17/ To the extent that more effective administration would increase the number of administratively resolved disputes, it would decrease the number of cases which would be filed in federal court by unsatisfied employees. By reviewing and reversing the single case *sub judice*, the Court could act to limit the workload of the lower courts, a goal worthy of promotion by use of the certiorari jurisdiction.

II.

THE COURT BELOW ERRED IN HOLDING THAT THE PLAINTIFFS HAD NOT EXHAUSTED ALL AVAILABLE ADMINISTRATIVE REMEDIES.

In an earlier case concerning federal employment discrimination, the Court below had required exhaustion of administrative remedies, but with the notation that the administrative procedure there available would not have been a "meaningless ritual." *Beale v. Blount*, 461 F.2d 1133, 1139 (5th Cir. 1972). The Fifth Circuit's initial view that foreseeably futile procedures need not be ritualisticly exhausted is supported by substantial other authority.18/

In the case *sub judice*, the plaintiffs went far beyond merely alleging that resort to the

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18/ *See*, *e.g.*, Houghton v. Shafer, 392 U.S. 639, 640 (1968) (per curiam); Eisen v. Eastman, 421 F.2d 560, 568-69 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); Williams v. Richardson, 347 F.Supp. 544 (W.D.N.C. 1972); 3 K. DAVIS ADMINISTRATIVE LAW §20.07.

administrative remedies would be futile; they alleged that they had resorted to these remedies, and that they had in fact proved futile. *Cf. Leedom v. Kyne*, 358 U.S. 184 (1958).

Judge Godbold's panel dissent, adopted by the court *en banc*,[19] thought this allegation insufficient to excuse exhaustion. (App. p. 35a.) But that opinion is based upon a quite basic misunderstanding of the administrative scheme at issue. While Judge Godbold believed that the petitioners should have persevered with their complaints, taking them to the Civil Service Commission, the administrative procedure did not permit such a move. Appeals to the Civil Service Commission were allowed only after the filing of written complaint with the Equal

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19/ App. at 1a.

Opportunity Officer.[20] Mr. Foster was not even permitted to file his written complaint. (App. p. 101a.) Therefore, he could not have done what the Court of Appeals demanded of him.[21] Mr. Penn was similarly excluded from administrative resolution of his claim.[22]

20/ 5 C.F.R. §§713.214-713.221. The current regulations retain the requirement that the complaint be made in writing in order to make the aggrieved employee eligible for further appeals in the administrative hierarchy. *See* 5 CFR §713.214(a) (1973). Thus the action at issue here — refusal to accept a written complaint — continues to be of overriding importance in the complaint process.

21/ Judge Godbold's opinion referred to the refusal to process Mr. Foster's claim as a "procedural slipup" which could be the subject of "self correction" by higher levels of command within the agency. App. p. 41a. But the administrative procedure in effect did not permit appeals which would correct these "procedural slipups." *See* note 20, *supra*.

22/ When Mr. Penn approached his E.E.O. Counselor she failed in her duty (5 C.F.R. §213(a) (1971)) to send him to the E.E.O. Officer for filing of a grievance. The system not only worked theoretically by imposing information-dispensing duties on such counselors; advice to see them was the only publicly displayed notice to employees. (App. p. 104a.)

Exhaustion of prescribed remedies is not a wooden formula, but rather requires an understanding of the administrative grievance procedure in question. *McKart v. United States*, 395 U.S. 185, 193 (1969). The court below erred by sternly requiring the petitioners to take appeals and file claims[23/] which the administrative procedure itself did not permit.

III.

THIS CASE OFFERS THE COURT AN OPPORTUNITY TO SETTLE TROUBLING AND LONG-STANDING ISSUES CONCERNING THE APPLICABILITY OF THE EXHAUSTION REQUIREMENT TO FEDERAL VERSUS STATE DEFENDANTS IN SUITS TO PROTECT CONSTITUTIONAL RIGHTS.

23/ The Court of Appeals excluded the NAACP's complaint, filed on behalf of its members who were refused employment, even though it is uncontested that no administrative procedure whatsoever was available to organizational plaintiffs or for unhired persons who had been discriminated against. *See* App. p. 2a, n. 1.

Two terms ago in *District of Columbia v. Carter*, 409 U.S. 418 (1973), the Court indicated that the old 1866 Civil Rights Act, which had been revitalized in 1968,[24/] applied not only to private and state acts of racial discrimination but to misconduct by federal officials as well. In the course of explaining why the 1870 Civil Rights Act, 42 U.S.C. §1983, did not cover the District of Columbia, the Court specifically distinguished that statute from the 1866 Act. The 1866 Act, said the Court, establishes an 'absolute' bar to <u>all</u> such racial discrimination, private as well as public, federal as well as state." 409 U.S. at 422. (Emphasis added.)

This case presents the Court with its first opportunity to determine how suits brought under the 1866 Act, which prescribes no administrative remedies, should be treated in light of executive orders and more recent legislation which do

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24/ *See* Jones v. Alfred Mayer Co., 392 U.S. 409 (1968).

require resort to federal administrative remedies.

The Court of Appeals' decision to require exhaustion of federal administrative remedies also raises substantial problems of federalism, for while the court below required exhaustion of federal administrative remedies, exhaustion of state remedies is not required in similar discrimination suits brought against state officials under 42 U.S.C. §1983. *See Wilwording v. Swenson*, 404 U.S. 249 (1971), *McNeese v. Board of Education*, 373 U.S. 668 (1963); *cf. Monroe v. Pape*, 365 U.S. 167 (1961). While the court of appeals below has explained this discrepancy in respect for administrative remedies by pointing out that the federal government is "on record" as opposing racial discrimination,[25/] that excuse is readily transparent, for many states whose administrative machinery is ignored by federal judges

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25/ Beale v. Blount, 461 F.2d 1133, (5th Cir. 1972).

are also on record as opposing racial discrimination. *See* Note, "Exhaustion of Federal Administrative Remedies Under Section 1981 of the Civil Rights Act," 1974 DUKE LAW JOURNAL 408, 421 and n. 69 (April 1974).

On a more general level the instant case, brought under a century-old statute prescribing no administrative exhaustion, also presents fundamental questions as to the very nature of the exhaustion of remedies doctrine as it is applied in the federal courts. Does the exhaustion of administrative remedies doctrine require exhaustion of only congressionally "prescribed" remedies as this Court has often said,[26/] or does the exhaustion doctrine extend to those administrative remedies which are "available" but unprescribed by the statutes creating the cause of action. Those opinions which have extended the

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26/ McKart v. United States, 395 U.S. 185, 193 (1969); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

doctrine to "all available" remedies generally cite for support only decisions from this Court involving Congressionally prescribed remedies.[27] The petitioners contend that if exhaustion of unprescribed remedies is to be required, it must be made after a principled inquiry into the interests to be served.[28] The case *sub judice* provides the opportunity for this inquiry in the context of §1981 actions against federal officials.

CONCLUSION

The above premises considered, a writ of certiorari should issue to review and reverse the judgment of the court below, and the case should be remanded to the district court for trial on the merits.

27/ *See, e.g.*, Bolger v. Marshall, 193 F.2d 37, 39 (D.C.Cir. 1951); Ogden v. Zuckert, 298 F.2d 312, 317 (D.C.Cir. 1961) (dissenting opinion).

28/ *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961); Home Telephone and Telegraph Co. v. C. of Los Angeles, 227 U.S. 278 (1913). *Compare* Barney v. C. of New York, 193 U.S. 430 (1904), *with* United States v. Raines, 362 U.S. 17, 25-26 (1960).

Respectfully submitted,

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